APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DONALD ROBERTS Appellant,	§ § §	
v.	§	No. 06-1899
MIKE KEMNA and, JEREMIAH NIXON Appellees.	§ § §	

Before MURPHY, RILEY and COLLOTON, Circuit Judges

JUDGMENT

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

July 18, 2006

Order Entered at the Direction of the Court:

/s/

MICHAEL E. GANS

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DONALD ROBERTS,	)	
Petitioner	)	
	)	
v.	)	No. 4:02CV126 RWS
	)	
MIKE KEMNA and,	)	
JEREMIAH NIXON	)	
Respondents.	)	

MEMORANDUM OPINION

Petitioner Donald Roberts seeks a writ of habeas corpus. In his Petition he alleges six grounds for relief. I referred this matter to United States Magistrate Judge Thomas C. Mummert, III for a report and recommendation on all dispositive matters pursuant to 28 U.S.C. § 636(b). On December 15, 2005, Judge Mummert filed his recommendation that Roberts' habeas petition should be denied.

Roberts timely filed objections to the Report and Recommendation and objects to the recommendation that habeas relief be denied. I have conducted a de novo review of all matters relevant to the petition. I find that Judge Mummert correctly analyzed Roberts' grounds for relief and correctly applied the law in reaching his recommendation. After careful consideration, I will adopt and sustain the thorough reasoning of Judge Mummert in his Report and Recommendation and I will deny Roberts' habeas petition.

I only add that Roberts' contention in his sixth ground for relief that his post-conviction counsel effectively abandoned Roberts for failing to include one claim in his amended

motion for post-conviction relief is not a cognizable ground for relief in a habeas petition.[1]

The Supreme Court of Missouri has recognized a limited right to effective assistance of counsel in post-conviction hearings. *Luleff v. State*, 807 S.W.2d 495 (Mo. 1991). When post-conviction counsel totally defaults in carrying out the obligations imposed upon counsel by Missouri Supreme Court Rule 29.15(e), it constitutes abandonment. *State v. Bradley*, 811 S.W.2d 379, 384 (Mo. 1991). Under such circumstances, new counsel should be appointed. The filing of an amended petition out of time, for instance, can constitute abandonment. *Sanders v. State*, 807 S.W.2d 493, 494-95 (Mo. 1991). Roberts' claim that his post-conviction counsel left out one claim1 in the amended motion for post-conviction relief does not constitute abandonment because his counsel did not totally default in carrying out her obligations.

Even if it did constitute abandonment, abandonment by post-conviction counsel cannot be the basis for relief in a habeas proceeding. In *Mack v. Caspari*, 92 F.3d 637, 640 (8th Cir. 1996), the Eighth Circuit suggested the possibility

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[1] This claim concerned the potential evidence of a pathologist named Dr. Richard Payne. Roberts asserts that this claim was in a questionnaire that he filled out and gave to his appointed post-conviction counsel. Roberts alleges that his post-conviction counsel failed to include this claim in his amended motion for post-conviction relief. Because the record does not contain a copy this questionnaire there is no evidence in the record that supports Roberts' claim of abandonment or which allows me to evaluate it. An issue of how clearly this claim was made and identified in the questionnaire is raised in Roberts' own habeas petition which states that "Mr. Roberts's educational level and intelligence level are low, and his questionnaire was not very articulate, but it certainly included Dr. Payne's name." The fact that a copy of the questionnaire has not been filed in this case is a separate and independent ground upon which I rely in denying Roberts' sixth claim for habeas relief. proceeding does not test the legality of a prisoner's sentence.

of a constitutional due process violation if upon abandonment by post-conviction counsel, the Missouri trial court applied the procedural rule of appointing new counsel arbitrarily and prejudiced a petitioner. But, the Eight Circuit concluded in a later opinion that although a due process violation may exist in a state post-conviction proceeding, it is not cognizable in a habeas petition. *Kenley v. Bowersox*, 228 F.3d 934, 938 (8th Cir. 2000). The Court reasoned that habeas review under 28 U.S.C. §2254 was limited to the question of whether a petitioner was in custody in violation of the Constitution or laws or treaties of the United States. Id. An attack on the procedure employed in the state post-conviction does not test the legality of a prisoner's sentence. The Eighth Circuit based its conclusions on a litany of cases which held that a §2254 court is not the appropriate forum for a prisoner who wishes to challenge the process afforded to him in his post-conviction proceeding. Id., See *Williams v. State*, 640 F.2d 140, 143-44 (8th Cir. 1981) (procedural errors in post-conviction proceeding do not raise constitutional claims cognizable in habeas corpus proceedings); *Williams-Bey v. Trickey*, 894 F.2d 314, 317 (8th Cir. 1990)(post-conviction proceeding is collateral to petitioners' conviction and detention and is not a cognizable habeas claim); *Smith v. Lockhart*, 882 F.2d 331, 334 (8th Cir. 1989)(same). Although the Eighth Circuit's opinion in *Kenley* was later vacated, the case law upon which it relied is still the law in this Circuit.

As a result, even if Roberts had made a valid claim for abandonment by his post-conviction counsel, it is not a cognizable ground for habeas relief. Based on the conclusion that Roberts' post-conviction counsel's omission of a claim did not constitute abandonment and based on the reasons stated in Judge Mummert's Report and Recommendation I find Roberts' sixth claim for relief to be without merit.

I have also considered whether to issue a certificate of appealability. To grant a certificate of appealability, the Court must find a substantial showing of the denial of a federal constitutional right. See *Tiedeman v. Benson*, 122 F.3d 518, 522 (8th Cir. 1997). A substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings. *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997) (citing *Flieger v. Delo*, 16 F.3d 878, 882-83 (8th Cir. 1994).

I believe that Roberts has not made such a showing on the grounds raised in his petition. Therefore, I will not issue a certificate of appealability.

Accordingly,

IT IS HEREBY ORDERED that Petitioner Donald Roberts' Petition for Writ of Habeas

Corpus is DENIED. IT IS FURTHER ORDERED that the Court will not issue a certificate of appealability. A separate judgment in accordance with this Memorandum and Order is entered this same date.

Dated this 16th day of March, 2006

/s/

RODNEY W. SIPPEL

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DONALD ROBERTS,	)	
Petitioner	)	
	)	
v.	)	No. 4:02CV126 RWS
	)	
MIKE KEMNA and,	)	
JEREMIAH NIXON[1]	)	
Respondents.	)	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

The 28 U.S.C. § 2254 petition of Donald Roberts ("Petitioner"), a Missouri prisoner serving four consecutive terms of life imprisonment with the possibility of parole, for federal habeas corpus relief is before the undersigned United States Magistrate Judge for a review and a recommended disposition. See 28 U.S.C. § 636(b).

Background

After the jury was seated, the prosecutor told them, in part, they would hear testimony about the stabbing by Petitioner of two men the night of January 26, 1996. (Resp. Ex. A-II at 201.) The two men and their girlfriends were in one car stopped by the side of the road; Petitioner and two other men were in Petitioner's car, also stopped. (Id. at 202, 203, 207.) One of the men, Chris McLafferty, punched Petitioner and knocked him to the ground. (Id. at 201.)

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[1] Because Petitioner is challenging a sentence to be served in the future, the Attorney General of Missouri, Jeremiah W. "Jay" Nixon, is hereby added as a proper party respondent. See Rule 2(b), Rules Governing Section 2254 in the United States District Courts.

McLafferty and Louis Viviano then helped Petitioner into Petitioner's car. (Id.) As they turned to walk back to their car, Petitioner stabbed them. (Id.) The prosecutor described it as "a case about two totally opposite worlds coming across just by chance in the middle of the night." (Id. at 202.)

One of Petitioner's trial counsel, Gregory Wittner, told the jury, in part, Petitioner was "viciously and violently sucker punched" in the face by McLafferty. (Id. at 216.) The punch caused him to fall backwards on the highway and become unconscious. (Id. at 217.) When he regained consciousness, he saw two large men, McLafferty and Viviano, standing over him. (Id.) The next thing he remembered was the feeling of being choked. (Id.) Fearing that he was going to die, Petitioner struck out with his knife at McLafferty until he was once again able to breathe. (Id. at 218.)

Viviano was the first witness to testify for the State.[2] (Id. at 222.) He testified that he; his fiancé, Rhonda McMasters; McLafferty; and McLafferty's fiancée, Emily Smith, were driving north on Highway 141 after spending the evening playing pool and drinking several, i.e., two to three, beers. (Id. at 225-28.) Viviano was driving his new Cobra Mustang; McMasters was in the front passenger seat; McLafferty and Smith were in the back. (Id. at 228.) When they stopped at a traffic light, the car next to them swerved into their lane. (Id. at 229.) Viviano swerved to avoid a collision, went onto the median, and then back on the road. (Id.) He drove off, so did the other car. (Id. at 230.) The other car sped up, so did he. (Id.) When Viviano saw someone in the back seat of the other car "flip[]" him off, he decided to turn around and head south on 141. (Id. at 232-33.) When he approached a red stop

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[2] The summary of the witnesses' testimony is not intended to be a complete recitation of the trial testimony. This summary is supplemented by the factual background set forth in the appellate court's decision affirming Petitioner's conviction and quoted, in relevant part, below.

light, the other car came up on the passenger side, swerved into his lane, ran him off the road, and then stopped in front of him. (Id.) McLafferty got out of the car, so did Viviano. (Id. at 236.) Viviano approached the driver's side, but McLafferty stayed at the back of the car. (Id. at 236-37.) Viviano asked the other driver what was going on. (Id. at 237.) Another man, identified as Petitioner, got out of the passenger's side of the car and walked at a fast pace toward McLafferty. (Id. at 237.) McLafferty hit him, knocking him down. (Id. at 238.) The driver of the other car then "floored" it. (Id.) That driver then did a U-turn and came back. (Id. at 238.) Viviano went over to where Petitioner was lying on the ground. (Id. at 241.) Viviano put his arms around Petitioner and lifted him up. (Id.) Petitioner was confused and kept asking questions about where he was and who Viviano was. (Id. at 241-42.) Viviano put Petitioner in the other car. (Id. at 242-43.) Viviano was looking at McLafferty when he saw Petitioner run up behind him. (Id. at 245, 306-07.) The returning car hit McLafferty, causing McLafferty to flip over the car. (Id. at 292.) The driver of the other car got out and punched Viviano in the face. (Id. at 245, 295.) The driver kept swinging at Viviano until Viviano got a hold of his arms. (Id. at 246.) Viviano told the other driver that he did not want to fight and let go of him. (Id. at 248.) The driver went back to the other car. (Id.) As Viviano and McLafferty walked back to their car, McLafferty told him that he had been stabbed. (Id. at 249.)

Viviano further testified that he did not know who had stabbed him. (Id. at 319.) He never saw a knife. (Id. at 250.) He also never saw McLafferty strangle, jump on, or stomp on Petitioner. (Id. at 240, 244.) He did not do so either. (Id. at 240, 244, 262-63.) McLafferty hit Petitioner only one time. (Id. at 239, 318.)

Viviano was stabbed six times, including once in his lung and once near his heart. (Id. at 255-56.)

Emily Smith testified that when both cars were stopped Viviano and McLafferty got out of the car. (Id. at 343.) A person in the front passenger side of the other car also got out as Viviano approached the driver's side. (Id. at 343-44, 348.) The person, identified as Petitioner, came up on McLafferty quickly. (Id. at 345.) McLafferty hit him in the face; Petitioner dropped to the ground. (Id.) McLafferty then walked away. (Id. at 346.) She did not see either McLafferty or Viviano strangle, kick, or wrestle Petitioner. (Id. at 346-47.) The other car took off when Petitioner was on the ground. (Id. at 348.) It circled the intersection and came back, "scoop[ing]" up McLafferty. (Id. at 348-49.) McLafferty rolled across the car's hood. (Id. at 349.) McLafferty and Viviano were walking back to their car when she saw Petitioner get out of the passenger side of the other car and run toward McLafferty. (Id. at 351-52.) McLafferty was bleeding when he came back to the car. (Id. at 353.) Smith never saw anyone with a knife, and never saw Viviano struggle with anyone. (Id. at 359.)

McMasters testified similarly to Viviano and Smith that, after both cars had stopped, Petitioner got out of the passenger side, quickly approached McLafferty, and fell after McLafferty punched him. (Id. at 391.) When Viviano and McLafferty were walking back to the car, both were bent over. (Id. at 394.) She never saw either man wrestle or strangle Petitioner. (Resp. Ex. A-III at 432.)

The medical examiner, Raj Nanduri, M.D., testified that McLafferty had six stab wounds in his back, all on the left side. (Id. at 454.) Although they varied in depth, most penetrated the muscle wall. (Id. at 452-53.) He died from the stab wounds in the back left side of his chest and abdomen. (Id. at 460.) Subra Vadlamani, M.D., and Robert Egan, M.D., also testified that McLafferty died from a stab wound to his heart. (Resp. Ex. A-IV at 624, 643.)

Charles Simshauser, a passenger in same car as Petitioner, was called as a witness for the State. He, Petitioner, and T.J. Gould, his then-girlfriend's son, were partying the night of January 26-27. (Resp. Ex. A-III at 518-19.) Gould was driving; Petitioner was riding in front; and he was in the back. (Id. at 527.) At one point, before they encountered the other car, Petitioner told him, "If anybody f**** with me I'll kill them." (Id. at 521.) Petitioner had a knife in his hand when he made this statement. (Id. at 523.) Simshauser had identified the knife in a deposition as being a double-bladed knife with a blade at least three inches long. (Id. at 522.) They drove from Illinois to Missouri and were on a highway when they noticed another car with two blonde girls. (Id. at 525.) They did not notice the two guys at first. (Id.) When the two cars later pulled over, Petitioner got out of his car and two guys got out of the Mustang. (Id. at 530.) T.J. drove off, doing "doughnuts." (Id. at 531.) Petitioner was laying on the ground. (Id.) When T.J. came back, he almost hit McLafferty. (Id.) McLafferty rolled over the car. (Id.) Simshauser never saw McLafferty attacking Petitioner when he was on the ground, nor did he see either McLafferty or Viviano do anything to Petitioner after McLafferty's first punch. (Id. at 534.) Viviano picked up Petitioner and tried to get him back into Petitioner's car. (Id.) McLafferty helped. (Id. at 535.) Petitioner resisted being placed in the car. (Id.) Eventually, the two men got Petitioner to sit down in the car. (Id. at 536.) Sitting in the back seat, Simshauser did not see either man choke, punch, or strangle Petitioner. (Id. at 536-37.) Petitioner started getting angry when he was being put back in the car. (Id. at 572.) Before the two men walked away, Petitioner took his knife out of his back pocket. (Id. at 538.) This was the knife Simshauser had seen earlier. (Id.) Petitioner headed toward the two men as they walked away; T.J. got out of the car. (Id. at 539.) Simshauser saw McLafferty fighting with T.J. and choking him. (Id. at 579.) He also saw Petitioner make a stabbing motion and then saw

the two men head back to their car. (Id. at 540-42.) He never saw anyone but Petitioner with a knife. (Id. at 543.) When everyone was back in their respective cars, the Mustang drove quickly off. (Id. at 545.) When Petitioner was back in the car, he did not recall being knocked out and he said he had stabbed someone. (Id. at 546-47.) T.J. told him he did not. (Id. at 547.) They drove by a nearby hospital and saw the Mustang, with blood all over it. (Id.) As they crossed the bridge back to Illinois, Petitioner said to pull over and threw a knife wrapped in a shirt out the window. (Id. at 548-50.) After they learned that someone had died, Petitioner called Simshauser and told him to be quiet. (Id. at 554.) Simshauser had been convicted of three felonies. (Id. at 554-55.)

Kevin Carle, a detective sergeant with the Jefferson County Sheriff's Department, interviewed Petitioner on January 28. (Id. at 652.) He saw no injuries to Petitioner's face or neck. (Id.) He did see, however, cuts and scrapes on his hand. (Id. at 653.)

After the State rested, the other of Petitioner's trial counsel, Bradford Kessler, questioned Petitioner on the record and without the jury present about whether Petitioner agreed that a defense of diminished mental capacity should not be presented. (Id. at 719- 729.) Dr. Rabun had examined Petitioner at the State's request and had found no diminished capacity. (Id. at 721.) Dr. Sam Parwatikar had examined Petitioner at the defense's request and had concluded that he was suffering from delirium that night. (Id. at 721-22.) Regardless, Kessler did not believe a defense of diminished mental capacity was a viable defense given that Petitioner had consistently maintained that he was acting in self-defense that night. (Id. at 723-24.) Kessler had informed Petitioner that he thought a diminished mental capacity defense weakened Petitioner's self-defense case and that the diminished mental capacity had a mixed etiology due to Petitioner's intoxication that night. (Id. at 827, 829.)

Petitioner testified that he agreed that the request for an instruction on diminished capacity should be withdrawn. (Id. at 829.) Additionally, Petitioner intended to testify in his own behalf. (Id. at 835.)

Petitioner presented three witnesses. The first two were disinterested witnesses who had been driving by the intersection where the two cars were stopped. (Id. at 706, 738.) They each saw a man lying on the ground. (Id. at 706, 740.) Neither saw anybody doing anything violent to the man on the ground, although the second witness saw one of two men standing above the supine man doing something with his hands. (Id. at 714-15, 740, 753-55.)

Thomas Gould also testified on Petitioner's behalf. He was then on parole and living in a halfway house. (Id. at 759.) The night of January 26, 1996, he drove Petitioner's car to Missouri. (Id. at 763.) When Petitioner first came to his house Gould could tell he had been drinking. (Id. at 801.) Simshauser was with him. (Id. at 763.) Once in Missouri, they saw a black Mustang with two girls and honked their horn. (Id.) At that point, a man in the Mustang looked around one girl. (Id.) The two cars took turns speeding up until Petitioner told him they were going the wrong way. (Id. at 764.) He made a U-turn, the Mustang followed. (Id. at 764-65.) The two cars pulled over and stopped. (Id. at 765- 66.) Gould looked in the rear view mirror and saw a door on the Mustang opening. (Id. at 766.) Somebody approached his car in a crouching position.[3] (Id.) He thought the person might have a gun, so he stepped on the gas and ran a red light. (Id. at 769.) He did not realize that Petitioner had gotten out of the car. (Id.) When he did realize it, he made a U-turn. (Id. at 770.) He saw Petitioner laying on the ground and tried to get

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[3] Gould testified on cross-examination that he had not mentioned the crouching in a prior statement but he did remember it. (Resp. Ex. A-V at 805-06.)

as close as possible to him. (Id. at 771.) He also saw one man standing over Petitioner and another standing farther back. (Id.) He did not seek anybody doing anything. (Id.) As he tried to get close to Petitioner, he accidentally hit McLafferty. (Id. at 773-74.) He thought McLafferty kicked his (Gould's) door. (Id. at 774.) McLafferty told Gould that if he tried to run him over again, he (McLafferty) would kill or hurt him "or something." (Id. at 775.) This was at the side of Gould's car. (Id.) McLafferty then walked over to the side where Viviano was helping Petitioner in the car. (Id. at 776.) McLafferty helped "in an aggravated manner." (Id.) Gould thought McLafferty was "kind of choking" Petitioner. (Id. at 777.) Petitioner had his back to Gould, but Gould could see part of McLafferty's fingers on Petitioner. (Id.) Gould thought Petitioner was in danger and jumped out of the car to help him. (Id. at 778.) He told the two men he would help Petitioner get in the car. (Id. at 779.) He was met in the back of the car by McLafferty. (Id. at 780.) McLafferty took a swing at him; he took a swing at McLafferty. (Id.) McLafferty walked away. (Id.) Viviano walked toward him. (Id. at 782.) Viviano hit Gould and the two men fought. (Id. at 783, 785.) Viviano then said "let's go before the cops get here." (Id. at 785.) Gould walked back to his car; Viviano walked back toward Petitioner. (Id. at 786.) The Mustang left first and in a hurry. (Resp. Ex. A-V at 843.)

On cross-examination, Gould testified that when he saw two guys by Petitioner he did not see anyone jump on, punch, kick, or doing anything else violent to him. (Id. at 811-12.) He saw Viviano help Petitioner off the ground and to the car's back door. (Id. at 814.) Petitioner did not want to get back into the car. (Id. at 815.) Gould never saw McLafferty or Viviano with a gun or a knife. (Id. at 819.)

During the prosecutor's rebuttal closing argument, Kessler moved to strike the prosecutor's remark, "You [the jury] haven't heard any testimony about what he said, about

his theory of the case." (Id. at 940.) Kessler argued that this remark was an impermissible comment on Petitioner's failure to testify. (Id.) The prosecutor explained that his remark referred to Kessler, not Petitioner. (Id. at 940-41.) Although agreeing that the prosecutor had been referring to Kessler, the court granted Petitioner's request to have the remark stricken and the jury instructed to disregard it and denied his request for a mistrial. (Id. at 942.)

Although the jury was instructed on self-defense, they found Petitioner guilty of second degree murder, first degree assault, and two counts of armed criminal action. (Resp. Ex. B at 85-88.) He was sentenced as a prior and persistent offender to four consecutive terms of life imprisonment with the possibility of parole. (Id. at 94-95.)

Petitioner appealed on two grounds: the trial court erred in (1) denying his motion for judgment of acquittal at the close of the State's case and at the close of all the evidence because the State failed to prove beyond a reasonable doubt that the killing and assault were not done in self-defense, and (2) denying his request for a mistrial after the prosecutor referred in closing argument to his failure to testify. (Resp. Ex. C at 14-15.)

The appellate court rejected each, finding, in relevant part:

> Around 11:00 p.m. on January 26, 1996 defendant met two friends in Illinois. They got into defendant's car; however, one of the friends drove. Defendant showed the others a three inch long knife. He told them, "If anybody fucks with me I'll kill them." After midnight, defendant's car came up on decedent [McLafferty], victim [Viviano], and their girlfriends in victim's car on Highway 141 in Jefferson County and temporarily forced them off the road. Defendant's car continued to harass victim's car in

various ways and finally stopped in front of it, causing victim to stop.

Decedent and victim emerged from victim's car and approached defendant's car. Defendant got out of his car and moved quickly toward decedent. Decedent punched defendant in the face and knocked him to the ground. The driver of defendant's car then drove away, made a U-turn, and returned for defendant. The car hit decedent who rolled over the hood, but was not injured. Victim helped defendant to his feet and to the passenger side of defendant's car. Victim told defendant to get in the car and go because they did not want to fight. Victim and decedent turned away from defendant's car and started walking back to their own car.

At that point, defendant pulled a knife from his back pocket, left the car, came up behind decedent, and stabbed him. Simultaneously, the driver of defendant's car punched victim and victim eventually grabbed his arms to keep him from fighting. Victim, who had his back to defendant and decedent, felt a blow to his side. He told driver again he did not want to fight and let the driver go. The driver ran back to the car. Victim turned and looked at decedent who was drenched in blood and said he had been stabbed. Victim was also bleeding profusely and realized he had been stabbed as well.

Victim and decedent returned to their car and their girlfriends drove them to St. Anthony's Hospital. Decedent was stabbed seven times in the back, once on the side, once on the arm, and once in the abdomen. Decedent died later that day from a stab wound to the left side of his chest that had pierced his heart. Victim was stabbed three times in the side and three times in the arm, requiring a five-day hospitalization. The stab wounds were made by a sharp bladed instrument with a blade at least three inches in length.

. . .

. . . [D]eadly force may be used in self-defense only when there is: (1) an absence of aggression or provocation on the part of the defendant; (2) a real or apparently real necessity for the defender to kill in order to save himself from an immediate danger of serious bodily injury or death; (3) a reasonable cause for the defender's belief in such necessity; and (4) an attempt by the defender to do all within his power consistent with his personal safety to avoid the danger and need to take a life.

. . .

Defendant points to the existence of testimony which would support his argument that he acted in self-defense and that he was in fear of his life. However, this evidence was not undisputed. The state adduced sufficient evidence to support an inference that defendant did not have a reasonable belief that deadly force was necessary to protect himself. The fight had ended and this fact was communicated to defendant by victim who told defendant to get into the car because they did not want to fight. Defendant and victim, who were unarmed, then walked away. Defendant was in the safety of his car when he pulled a knife from his back pocket, ran after decedent and victim, and stabbed them. Regardless of whether defendant was or was not at fault in the earlier struggle, he became the aggressor when he renewed the fight. Further, self-defense is justified only when danger is imminent, not when the victim is in retreat.

. . . Defendant was not entitled to acquittal as a matter of law. . . .

In his second point defendant contends that the trial court erred in overruling defendant's request for a mistrial "when the prosecutor in closing argument

pointed to defendant[4] and remarked that the jury had heard from the medical examiner his theory of how the killing took place but had not heard his theory of the case, referring to defendant," which was a comment on the defendant's failure to testify.

. . .

Defendant challenges the following remark which the prosecutor made during the rebuttal portion of the state's closing argument. "You haven't heard any testimony about what he said, about his theory of the case."

Defense counsel objected to the statement. During a sidebar conference the state explained the comment was directed to the defense counsel's failure to show any evidence to prove the theory he had just set forth in his closing argument. In fact, the state had begun its rebuttal argument by describing "Mr. Kessler's theory" of the case and continued discussing the problems with that theory during its rebuttal argument. The sentence complained of fell within this discussion. Nevertheless, the judge sustained the objection, cautioned the jury to disregard the statement, ordered the statement stricken from the record, but denied the motion for mistrial. The state then continued with its rebuttal argument by starting out with the words "Mr. Kessler's theory. . . ."

We are not persuaded that the remark was a direct or indirect reference to defendant's failure to testify. . . .

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[4] The appellate court inserted at this point the following footnote.

"Nothing in the record indicates that the prosecutor pointed at anyone. Defense counsel did not raise this in his objection." (Resp. Ex. E at 6.)

> The remark was made during rebuttal by the state after the defense counsel had argued a theory to the jury. The entire preceding portion of the rebuttal was specifically devoted to an analysis of defense counsel's theory and defense counsel was identified by name. In this context, the "he" and "his" as used in the "he said" and "his theory" logically refers to defense counsel, not defendant. If there was any possibility that the jury misunderstood to whom the "he" and "his" referred, the trial court's action sufficiently cured any misunderstanding.

The trial court did not abuse its discretion in denying a mistrial. . . . (Resp. Ex. E at 2-7.) (All but second-to-last alteration added.) (Second footnote omitted.)

Petitioner moved for post-conviction relief pursuant to Missouri Supreme Court Rule 29.15. (Resp. Ex. I at 7-22.) His motion was amended by appointed counsel and was submitted following an evidentiary hearing at which Wittner and Petitioner's first trial counsel, Joseph Sanchez, testified and the introduction of Petitioner's and Kessler's depositions. (Id. at 27-48, 50-64.)

Wittner testified that he did not recall Petitioner calling his attention to something one of the jurors had done and did recall that Dr. Parwatikar's report was "rather confusing and problematic." (Resp. Ex. F at 14, 17.) Sanchez testified that he had obtained a report of a forensic expert, August C. Milgess,[5] that a shoe print on the front driver's door of Petitioner's car matched McLafferty's shoes, that he had planned on introducing the report to establish that McLafferty was the initial aggressor, and that he had given Kessler the report. (Id. at 25, 30, 31-32.) Kessler testified in

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[5] This name is spelled elsewhere in the record as "Nilges."

his deposition that it was never brought to his attention that a juror had mouthed something to Petitioner; he would have remembered if it had been. (Resp. Ex. G at 17-18.) He did not introduce the forensic report because (a) it was a "little bit disingenuous to argue that [McLafferty] kicked the car and he deserved to be stabbed"; (b) "[y]ou can't kill somebody for hurting your property[;]" and (c) it was undisputed that McLafferty was the initial aggressor. (Resp. Ex. G at 35-37.) He did not recall that a defense of others was supported by the evidence. (Id. at 43.) Moreover, "if the person against whom the greater harm was directed [didn't] have a right to defend himself, then you certainly aren't going to make a case that he had a right to defend someone else with deadly force[.]" (Id. at 46.) Additionally, Kessler testified that a defense of diminished mental capacity would have weakened Petitioner's defense of self-defense. (Id. at 49.)

Petitioner also thought that the shoe print on the door would have established that McLafferty was the initial aggressor and he told Kessler that he wanted that evidence introduced. (Resp. Ex. H at 9, 11.) Evidence that he was suffering from delirium that night would have explained why he did not know that he was hitting McLafferty in the areas he did and why he thought he was hitting him in the arm and shoulder. (Id. at 40.) When he did stab McLafferty he did not know where Gould was; however, when he went to get away from McLafferty he ran into Viviano and it looked like Viviano had Gould by his head. (Id. at 25, 81.) He was concerned for both himself and Gould. (Id. at 26.) McLafferty tried to strangle Gould also. (Id. at 85.) Petitioner further testified that, although he had told the trial court that it was his decision to withdraw the defense of diminished mental capacity, it was not. (Id. at 89.) He did not think his

record – 18 felonies[6] – would have had any affect on the jury because they were all for burglary. (Id. at 44-45.) And, he always carried a knife for self-defense but had not needed it until that night. (Id. at 72.) Petitioner had had at least twelve 12 or 16 ounce beers that night. (Id. at 69.)

The motion court denied relief. (Resp. Ex. I at 50-54.) Addressing Petitioner's claim that his trial counsel was ineffective for not submitting an instruction on defense of another, the court found that such decision was a matter of trial strategy and that Petitioner had failed to establish prejudice from that decision. (Id. at 51.) Counsel was not ineffective for not presenting the shoe print evidence because it had already been established that McLafferty was the initial aggressor and counsel's perception that the kicking of the car would not, in the minds of the jurors, justify the stabbing was a matter of trial strategy. (Id. at 51-52.) Counsel's decision not to present a defense of diminished mental capacity was also a matter of trial strategy based on counsel's decision that the defense would detract from the defense of self-defense. (Id. at 52.) Moreover, (a) there was nothing to indicate that the jury would have believed the testimony of Dr. Parwatikar over Dr. Rabun and (b) Petitioner knowingly waived his right to proceed on that defense. (Id.) Addressing Petitioner's claim that trial counsel was ineffective for failing to bring to the court's attention the words mouthed by one of the jurors, the court found that Petitioner had failed to prove that such misconduct had occurred. (Id. at 53.)

Petitioner appealed. (Resp. Ex. J.) Each of his four grounds was found to be without merit in a one-paragraph unpublished per curiam order. (Resp. Ex. L.)

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[6] Petitioner was 30 years old at the time of trial.

Petitioner now seeks federal habeas relief on his previously-presented claim of prosecutor misconduct and four claims of ineffective assistance of trial counsel and on a new claim of ineffective assistance of trial counsel for failure to introduce a report by a Dr. Payne about the wounds on McLafferty that would have supported Petitioner's description of events. Petitioner explains that this sixth ground was not presented to the state courts because the post-conviction process failed; specifically, post-conviction counsel effectively abandoned him by not including this ground although he had informed her of it.

Discussion

Standard of Review. Title 28 U.S.C. § 2254(d) mandates that a federal court "not grant habeas relief on a claim that was adjudicated on the merits in state court unless 'it resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,'" *James v. Bowersox*, 187 F.3d 866, 869 (8th Cir. 1999) (quoting § 2254(d)(1)), or it "'resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,'" *Evans v. Rogerson*, 223 F.3d 869, 871 (8th Cir. 2000) (quoting § 2254(d)(2)). See also *Weaver v. Bowersox*, 241 F.3d 1024, 1029 (8th Cir. 2001) ("Section 2254(d) distinguishes between two types of erroneous decisions – those of law and those of fact[.]").

The "contrary to" clause and the "unreasonable application" clause have independent meanings. *Williams v. Taylor*, 529 U.S. 362, 405 (2000). "[A] state court decision is 'contrary to [the Supreme Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases' or 'if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and

nevertheless arrives at a result different from [their] precedent.'" *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams*, 529 U.S. at 405-06) (alterations added). "On the other hand, a run-of-the-mill state-court decision applying the correct legal rule from [Supreme Court] cases to the facts of a prisoner's case would not fit comfortably within §2254(d)(1)'s 'contrary to' clause." *Williams*, 529 U.S. at 406 (alteration added). Thus, a state court decision that correctly identifies the controlling legal authority and, applying that authority, rejects a prisoner's claim does not fit within the "contrary to" clause although it might be contrary to a federal court's conception of how that authority ought to be applied in that particular case. *Id.*

Such a state court decision can, however, fit within the "unreasonable application" clause. Id. at 407-08. "[W]hen a state-court decision unreasonably applies the law of [the Supreme Court] to the facts of a prisoner's case, a federal court applying § 2254(d)(1) may conclude that the state-court decision falls within that provision's 'unreasonable application' clause." *Id.* at 409 (alterations added). "[A] federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* (alteration added). When making this inquiry, a federal habeas court should note that "an unreasonable application of federal law is different from an incorrect application of federal law." Id. at 410. "It is not enough that a federal habeas court, in its independent review of the legal question, is left with a firm conviction that the state court was erroneous." *Lockyer*, 538 U.S. at 75 (internal quotations omitted). And, "'[t]o the extent that inferior federal courts have decided factually similar cases, reference to those decisions is appropriate in assessing the reasonableness . . . of the state court's treatment of the contested issue.'" *Copeland v. Washington*, 232 F.3d 969, 974 (8th Cir. 2000) (quoting *Long v. Humphrey*,184 F.3d

758, 761 (8th Cir. 1999)) (alterations in original). Additionally, "the [state courts'] 'summary nature' of the discussion of [a] federal constitutional question does not preclude application of the AEDPA standard." *Brown v. Luebbers*, 371 F.3d 458, 462 (8th Cir. 2004) (alterations added).

Claim One: Prosecutorial Misconduct. Petitioner first contends that the prosecutor improperly commented in the rebuttal portion of his closing argument on Petitioner's failure to testify by telling the jury that they had not "heard any testimony about what he said, about his theory of the case." Respondent counters, and the state appellate court so found, that the "he" and "his" refer to Kessler. Petitioner argues in his traverse that the prosecutor was referring to Petitioner and the state appellate court's finding otherwise is an unreasonable determination of the facts.

In response to the prosecutor's argument that Petitioner did not have to get out of the car once Viviano and McLafferty put him there and did not have to stab either as many times as he did, Kessler argued that the law required that Petitioner reasonably believed that he used the amount of force necessary to defend himself, not that his belief was right.

(Resp. Ex. A-V at 924-25.) "[I]t doesn't matter what's true, it's what is perceived. It is what is the perception of the person who uses force to defend himself[.]" (Id. at 930-31.) Kessler further argued that the evidence of Dr. Nanduri was inconsistent with someone being stabbed when their back was to their assailant. (Id. at 935.) "The only explanation is that person had to have been facing him, had to have been preventing the other person from moving enough because every single one [wound] is in the same track." (Id.) The third sentence in the prosecutor's rebuttal began with "Mr. Kessler's theory . . ." (Id. at 938.) The fourth sentence refers to "the theory" when Kessler was questioning the doctor. (Id.

at 939.) A short time later, the prosecutor made the two objected-to references. (Id. at 940.)

"[T]he Fifth Amendment 'forbids . . . comment by the prosecution on the accused's silence . . .'" *United States v. Robinson*, 485 U.S. 25, 30 (1988) (quoting *Griffin v. California*, 380 U.S. 609, 615 (1965)) (alterations added). Accord *United States v. Triplett*, 195 F.3d 990, 995 (8th Cir. 1999); *United States v. McDougal*, 137 F.3d 547, 559 (8th Cir. 1998). The impermissible comment may be either direct or indirect. *Triplett*, 195 F.3d at 995 (citing *Sidebottom v. Delo*, 46 F.3d 744, 759 (8th Cir. 1995)). "'Indirect references to a defendant's failure to testify are . . . prohibited if they either (1) manifest the prosecutor's intention to call attention to the defendant's failure to testify, or (2) are such that the jury would naturally have understood them as a comment on the defendant's failure to testify.'" Id. (quoting *Sidebottom*, 46 F.3d at 759) (alteration in original). "On a habeas petition, [the Court] review[s] any improper reference to determine if it had a 'substantial and injurious effect or influence in determining the jury's verdict.'" *Parkus v. Delo*, 33 F.3d 933, 941 (8th Cir. 1994) (quoting *Brecht v. Abrahamson*, 503 U.S. 619, 637 (1993)) (alterations added).

The trial court interpreted the two remarks at issue to be a reference to the theory of the case presented by Kessler in his closing argument. The reasonableness of the trial court's interpretation must be examined in the context in which the comments were made and also requires an analysis of the trial evidence. *United States v. Gardner*, 396 F.3d 987, 991 (8th Cir. 2005). "'[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.'" *Id.* at 992 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974)) (alteration added).

The context is that the prosecutor made the two remarks following defense counsel's closing argument. In his argument, Kessler did present a theory of the case, specifically that Petitioner reasonably believed that he was under attack by two men significantly larger than he and that the wounds described by Dr. Nanduri were more consistent with Petitioner being attacked from the front than with Petitioner running up behind someone. The prosecutor began his rebuttal with a reference to "Mr. Kessler's theory." An interpretation that later references to "his theory" and what "he said" are also to Kessler is not unreasonable. See *United States v. Carl*, 978 F.2d 450, 452 (8th Cir. 1992) (holding that court could not find prosecutor clearly intended to comment on defendant's failure to testify "if some other explanation for the remarks is equally plausible"). See also *Herrin v. United States*, 349 F.3d 544, 546 (8th Cir. 2003) (finding no improper remark when context of comment that "[a] guilty man doesn't say anything" established that it referred to other accused, i.e., prosecutor referred to that accused in opening of his statement); *Parkus*, 33 F.3d at 941 (finding no improper remark on petitioner's failure to testify by prosecutor who commented that the jury could only determine "what a man [wa]s thinking by his actions, or if he tells you"; comment was made in response to defense attorney's arguments about lack of motive and deliberation and was single short comment during trial lasting several days).

Moreover, the remarks were not made in reference to something about which only Petitioner could have testified. See *Gardner*, 396 F.3d at 992; *Triplett*, 195 F.3d at 995. See also *United States v. Dunlap*, 28 F.3d 823, 825-26 (8th Cir. 1994) (holding that prosecutor did not refer to defendant's failure to testify when arguing that there was no evidence to support defendant's theory; there was no such evidence and such evidence could have been presented by other witnesses). The remarks were also made at the end of a three-day trial,

and the jury, having been earlier instructed that it could not consider anything the court told it to disregard or which the court ordered stricken from the record, was told to disregard the remarks and they were stricken from the record. (Resp. Ex. B at 66.) "'The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process.'" *Gardner*, 396 F.3d at 993 (quoting *Richardson v. Marsh,* 481 U.S. 200, 211 (1987)).

For the foregoing reasons, the undersigned finds that the prosecutor's two challenged remarks were not a direct or indirect reference to Petitioner's failure to testify. Had they been, however, Petitioner was not prejudiced by the two brief remarks, stricken from the record, in the context of the entire trial.

Claims Two through Five: Ineffective Assistance of Trial Counsel. Petitioner's next four claims allege ineffective assistance of trial counsel and were raised in his postconviction appeal.

"The right to effective assistance of counsel 'is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process.'" *Smith v. Rogerson*, 171 F.3d 569, 572 (8th Cir. 1999) (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986)). "'The benchmark for judging any claim of ineffectiveness [of counsel] must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the [relevant proceeding] cannot be relied on as having produced a just result.'" *Jackson v. Gammon*, 195 F.3d 349, 354 (8th Cir. 1999) (quoting *Kellogg v. Skon*, 176 F.3d 447, 452 (8th Cir. 1999)) (first alteration added; second in original). "Only reasonable competence, the sort expected of the ordinary fallible lawyer,

is demanded by the Sixth Amendment." *White v. Helling*, 194 F.3d 937, 941 (8th Cir. 1999) (internal quotations omitted). Moreover, "[t]here is a strong presumption that counsel's challenged actions or omissions were, under the circumstances, sound trial strategy." *Garrett v. Dormire*, 237 F.3d 946, 949-50 (8th Cir. 2001) (alteration added).

To establish that counsel's lack of competence violated the Sixth Amendment, the petitioner must show that counsel's performance was deficient and prejudicial. *Kellogg*, 176 F.3d at 452. To establish that counsel's performance was deficient, a petitioner must show that counsel "'made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" *Greiman v. Thalacker*, 181 F.3d 970, 971 (8th Cir. 1999) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To establish prejudice, a petitioner must demonstrate "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (quoting *Strickland*, 466 U.S. at 697). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Carroll v. Schriro*, 243 F.3d 1097, 1100 (8th Cir. 2001) (quoting *Strickland*, 466 U.S. at 694). "'In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.'" *Lawrence v. Armontrout*, 31 F.3d 662, 666 (8th Cir. 1994) (quoting *Strickland*, 466 U.S. at 695). The burden of showing a reasonable probability is the petitioner's. *Lawrence v. Armontrout*, 961 F.2d 113, 115 (8th Cir. 1992).

The question of prejudice from counsel's performance need not be reached if the performance was not deficient. See *Parkus v. Bowersox*, 157 F.3d 1136, 1140 (8th Cir. 1998). Conversely, the question of counsel's allegedly deficient performance need not be reached if a petitioner has failed to show prejudice. See *Strickland*, 466 U.S. at 697; *Hoon v.*

Iowa, 313 F.3d 1058, 1061 (8th Cir. 2002); *Siers v. Weber*, 259 F.3d 969, 974 (8th Cir. 2001). Thus, if a petitioner has failed to show that, but for an allegedly deficient performance by his trial counsel, there is a reasonable probability that the outcome of his trial would have been different, his claim of ineffective assistance of counsel fails.

Petitioner's claim that his trial counsel was ineffective for failing to request an instruction on defense of a third-person was rejected by the state courts on the grounds that the decision not to submit the omitted instruction was a matter of trial strategy.

"'[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.'" *Neal v. Acevedo*, 114 F.3d 803, 807 (8th Cir. 1997) (quoting *Strickland*, 466 U.S. at 690) (alteration in original). This is true "even if that strategic decision proves unwise." *Wing v. Sargent*, 940 F.3d 1189, 1191 (8th Cir. 1991). Moreover, "[t]he fact that hindsight later reveals defects in counsel's strategy does not render that strategy unreasonable." *Id.* (alteration added). The strength of the presumption that a strategic choice is reasonable varies, however, with the adequacy of the investigation. *White v. Roper*, 416 F.3d 728, 732 (8th Cir. 2005). The more thorough or complete the investigation, the stronger the presumption. *Id.*

Citing *State v. Jones*, 627 S.W.2d 322 (Mo. Ct. App. 1982) and *State v. Vancil*, 976 S.W.2d 628 (Mo. Ct. App. 1998), Petitioner argues that his trial counsel did not make such an investigation because a defense of defense of others is not inconsistent with a defense of self-defense. Petitioner misapprehends trial counsel's strategy.

Trial counsel testified that he thought the evidence did not support the omitted instruction, not that such an instruction was always inconsistent with an instruction on

self-defense. The issue in *Jones* and *Vancil* was whether the trial court had erred in refusing to give the defendant's requested instruction on justification by lawful defense of another person. "Defense of another person is available if, under the circumstances as the actor reasonably believes them to be, the person whom he seeks to protect would be justified in using such protective force in defense of himself." *Vancil*, 976 S.W.2d at 630. The appellate court held in *Jones* that, although the jury had been instructed on self-defense, the trial court had erred in not giving the defense-of-another instruction because there was evidence supporting such an instruction, specifically, evidence that the victim had knocked the defendant's sister to the floor and was standing over her when the defendant, responding to a call for help, entered the room, fired a warning shot, and then shot at the victim as the victim turned and rushed toward him. 627 S.W.2d at 323. In *Vancil*, two groups were fighting and the defendant, in one group, attacked the victim, in the second group, as the victim pursued another man, Dixon, into a store. 976 S.W.2d at 629. The trial court instructed on lawful defense of another person as to another man, Rose, that had been with defendant, but refused to instruct on defense of Dixon. *Id.* The state conceded that this was error, and the appellate court so found. *Id.* at 630.

The question in the instant case, however, is not of trial court error but of trial counsel strategy. The only evidence that would have supported an instruction on defense of another was the testimony of Gould. Gould – described by defense counsel in closing as "[a] guy who starts trouble and then tries to run from it" – testified that McLafferty took a swing at him; he took a swing at McLafferty; and McLafferty walked away. (Resp. Ex. A-V at 933.) Viviano hit him; he hit back; the two fought; they stopped fighting; and Gould walked backed to his car. Thus, the events described by Gould establish that the physical altercation between him and Viviano and him and McLafferty stopped before any use of

deadly force. Petitioner testified in his deposition that he was afraid for Gould; however, this testimony was not before the jury.

Petitioner has failed to show that trial counsel's decision was not a strategic one made after a thorough investigation. Although he disagrees with this decision, his conclusory disagreement alone does not suffice to make this necessary showing.

Additionally, Petitioner cannot show any prejudice from the decision. The Missouri Court of Appeals held in *Hill v. State*, 160 S.W.3d 855 (Mo. Ct. App. 2005), that the failure to instruct on defense of another was not prejudicial in a case in which the jury's rejection of a defense of self-defense also answered the question whether the defendant had acted in lawful defense of another. *Id.* at 862. The only factual possibility that would have supported either established that any use of deadly force would have been simultaneously in self-defense and in defense of another. *Id.* Similarly, in the instant case, the factual possibility that would permit the jury to find that Petitioner acted in selfdefense depended on the jury finding that he reasonably believed that he was in "imminent danger of harm." (Resp. Ex. B at 72, 77.) For the jury to reject this defense they would have had to believe the testimony that Petitioner attacked McLafferty and Viviano after being put in the car and being able to withdraw from the situation. Their rejection of this defense would apply equally to any defense of Gould.

Petitioner next argues that his trial counsel was ineffective for failing to introduce a forensic expert's report matching the shoe print on the driver's door of his car to shoes worn by McLafferty.[7] Assuming, without deciding or

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[7] Petitioner emphasizes that his former trial counsel, Sanchez, had planned to introduce this testimony. Counsel is

implying that this decision was erroneous, Petitioner cannot show prejudice. It was undisputed that McLafferty was the initial aggressor and was a big man. The only evidence of him kicking the door came from Gould's testimony that it happened when he hit McLafferty with the car. The question before the jury was whether Petitioner stabbed McLafferty and Viviano after being able to withdraw from any confrontation, not whether McLafferty was the initial aggressor.

Petitioner's fourth claim, and his third claim of ineffective assistance of trial counsel, is that counsel should have presented evidence of his diminished mental capacity at the time of the stabbing. He argues that a diminished capacity defense is not inconsistent with a claim of self-defense and that Dr. Parwatikar's report was more thorough than that of Dr. Rabun and would have been found to be more credible.

Again, his constitutional challenge to trial counsel's decision is no more than a disagreement with counsel's strategy. Dr. Parwatikar's report was fourteen pages long and concluded that "[Petitioner] partially recovered from this post concussion delirium after he was pushed into the car and Mr. Gould turned the dome light on [on the way back to Illinois] and seeing the injury to his hand and the knife, some realization of his actions occurred." (Traverse Ex. 1 at 14.) According to this report, Petitioner was "heavily intoxicated" that night and "had had at least twenty beers if not more." (*Id.* at 11.) Dr. Rabun's report was seventeen pages long and concluded that Petitioner was capable of "knowing and appreciating the nature, quality, and wrongfulness of his conduct at the time of the alleged offense." (Traverse Ex. 3 at

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not "ineffective under constitutional standards merely because other lawyers may have used another strategy." *Wing*, 940 F.3d at 1192 (interim quotations omitted).

17.) One of Petitioner's trial counsel described Dr. Parwatikar's report as "problematic." Indeed, Dr. Parwatikar's reference to Petitioner being heavily intoxicated and having partially recovered from the delirium after being pushed into the car is not an unqualified finding of diminished mental capacity. His other counsel recommended against submitting a defense of diminished mental capacity based on this report on the grounds that it would weaken Petitioner's self-defense argument. Under oath, Petitioner informed the court that he agreed with this decision. The lack of success of this strategy does not render it unreasonable.

Petitioner's last claim of ineffective assistance of trial counsel is based on his allegations that a juror mouthed "I'm going to get you" during trial and that, although he informed both attorneys of this, neither brought it to the court's attention. One trial counsel could not recall Petitioner telling him about the juror; the other specifically testified that he was not told. The state court found Petitioner did not inform his counsel of the juror misconduct. "[S]tate court factual findings carry a presumption of correctness that will be rebutted only by clear and convincing evidence." *Cox v. Burger*, 398 F.3d 1025, 1028 (8th Cir. 2005) (interim quotations omitted) (alteration added). Additionally, "[f]ederal habeas review 'gives federal courts no license to redetermine [the] credibility of witnesses whose demeanor has been observed by the state trial court, but not by them.'" *Perry v. Kemna*, 356 F.3d 880, 885 (8th Cir. 2004) (quoting *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983)) (first alteration added; second in original). Thus, the motion court's factual finding that Petitioner did not tell counsel of the remark defeats his fifth claim.

Sixth Claim: Ineffective Assistance of Counsel. Petitioner's sixth claim – that counsel was ineffective for failing to obtain and present evidence that Petitioner's description of events corresponded with physical evidence of

the wounds on McLafferty[8]– was not raised in the appeal from the denial of his post-conviction motion.

Title 28 U.S.C. § 2254(b)(1)(A) and the Supreme Court bar the granting of habeas corpus relief unless it appears that the state prisoner has exhausted available state court remedies. See *Baldwin v. Reese*, 541 U.S. 27, 27 (2004); *Gray v. Netherland*, 518 U.S. 152, 161 (1996); *Coleman v. Thompson*, 501 U.S. 722, 730 (1991). "'Because "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation," federal courts apply the doctrine of comity, which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." *Dan v. Burford*, 339 U.S. 200, 204 (1950))." *Id.* at 731 (quoting *Rose v. Lundy*, 455 U.S. 509, 518 (1982)). See also *Weeks v. Bowersox,* 119 F.3d 1342, 1349-50 (8th Cir. 1997) ("Requiring the exhaustion of state remedies both allows the states to correct any possible constitutional violations without unnecessary intrusion by the federal courts and allows the state courts to create a factual record should the matter proceed to federal court.").

It is undisputed that Petitioner did not present this second claim in the appeal from the denial of his Rule 29.15 motion, see Mo.S.Ct.R. 29.15(a) (requiring claims of ineffective assistance of trial and appellate counsel to be raised in Rule 29.15 motion), and that there is no other available state remedy for him to now present them, see Mo.S.Ct.R. 29.15(l)

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[8] The evidence at issue an October 1999 opinion by Richard L. Payne, M.D., that the fatal wound to McLafferty could not have been made from behind. (Traverse Ex. 4 at 1.)

(forbidding circuit courts from entertaining successive Rule 29.15 motions).

"[A] habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance. A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him." *Coleman*, 501 U.S. at 732 (alteration added). Thus, Petitioner has met the technical requirement for exhaustion of this claim.

In order to preclude habeas petitioners from avoiding the exhaustion requirement and to "ensure[] that the States' interest in correcting their own mistakes is respected in all federal habeas cases," *id.* (alteration added), the state procedural bar that gives rise to a habeas petitioner having technically satisfied the exhaustion requirement provides an independent and adequate state-law ground for the petitioner's conviction, *id.* at 730; *Gray*, 518 U.S. at 162. This independent and adequate state law ground prevents federal habeas review of a defaulted claim "unless [the petitioner] can show cause and prejudice for the default, or actual innocence." *Clemons v. Luebbers*, 381 F.3d 744, 750 (8th Cir. 2004) (alteration added). The failure to include specific claims in the appeal from the denial of a Rule 29.15 motion results in those claims being procedurally barred. See *Osborne v. Purkett*, 411 F.3d 911, 919 (8th Cir. 2005).

"'[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.'" *Ervin v. Delo*, 194 F.3d 908, 915 (8th Cir. 1999) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)) (alteration in original). There is no exhaustive catalog of the objective impediments, nor have the precise contours of the cause requirement been

clearly defined. *Ivy v. Caspari*, 173 F.3d 1136, 1140 (8th Cir. 1999). "At a minimum, however, [Petitioner] must show that 'something external to [him], something that cannot fairly be attributed to him,' caused the procedural default." *Id.* (quoting *Coleman*, 501 U.S. at 753) (first alteration added; second in original).

Petitioner argues that the failure of post-conviction counsel to raise this claim is cause for the resulting procedural default. The alleged ineffectiveness of state postconviction counsel cannot, however, supply the required cause to excuse a procedural default. *Taylor v. Bowersox*, 329 F.3d 963, 971 n.13 (8th Cir. 2003); *Burns v. Gammon*, 173 F.3d 1089, 1092 (8th Cir. 1999); *Malone v. Vasquez*, 138 F.3d 711, 719 (8th Cir. 1998). Petitioner attempts to evade this holding by contending that the default was caused by post-conviction counsel's failure to raise it; thus, counsel effectively abandoned Petitioner. This contention is unavailing.

The merits of a procedurally defaulted claim may be reached if actual innocence is established. See *Cox*, 398 F.3d at 1031. To do so, a petitioner "must come forward with new reliable evidence that was not available at trial[.]" *Nance v. Norris*, 392 F.3d 284, 291 (8th Cir. 2004) (alteration added). The report at issue, see note 7, above, was not new, could have been available at trial, and was available before the evidentiary hearing on Petitioner's post-conviction motion. This sixth claim is procedurally barred.

Conclusion

For the foregoing reasons, Petitioner's first five claims are without merit and his last is procedurally barred. Accordingly,

IT IS HEREBY ORDERED that the Attorney General of Missouri, Jeremiah W. Nixon, is added as a Respondent.

IT IS HEREBY RECOMMENDED that the 28 U.S.C. §2254 petition of Donald Roberts be DENIED without further proceedings.

The parties are advised that they have eleven (11) days in which to file written objections to this Report and Recommendation pursuant to 28 U.S.C. §636(b)(1), unless an extension of time for good cause is obtained, and that failure to file timely objections may result in waiver of the right to appeal questions of fact. See *Griffini v. Mitchell*, 31 F.3d 690, 692 (8th Cir. 1994).

Dated this 16th day of March, 2006

/s/

THOMAS C. MUMMERT III

UNITED STATES MAGISTRATE JUDGE

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October 21, 1999

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Dear Ms. Stroup:

I reviewed some of the records you gave me.

Donald Roberts was not driving a car. Christopher McLafferty and Donald Roberts both exited from their respective vehicles. Christopher McLafferty struck Donald Roberts with his Right hand resulting in injury to Christopher McLafferty's Right hand, and, resulting in a concussion to Donald Roberts. Donald Roberts, following the concussion,

fell to the ground in a supine position and became unconscious.

Christopher McLafferty died from a stab wound that entered the Left axilla and lacerated the Right posterior ventricle resulting in hemopericardium and cardiac tamponade. The stab wound that killed Christopher McLafferty was done by a frontal approach and Christopher McLafferty's Left arm had to be extended to expose the axilla at the time of the injury to Christopher McLafferty. Donald Roberts was not behind, or posterior to, Christopher McLafferty at the time of the stab wound to the axilla and Right heart of Christopher McLafferty.

Christopher McLafferty struck Donald Roberts resulting in a concussion to Donald Roberts and a temporary unconscious state. As Donald Roberts was returning to a conscious state, he may have been in a state of hyperactivity or fright, particularly if there was neck or tracheal compression resulting in either hypoxia (decreased 02) or hypercapnia (increased CO2). Therefore, the striking of Donald Roberts by Christopher McLafferty may have significantly contributed to the death of Christopher McLafferty.

Please find attached a copy of a portion of the medical record of Christopher McLafferty from St. Anthony's Medical Center. Please note the patient arrived at the emergency room at approximately 0145 hours on January 27, 1996. On arrival he had no blood pressure; pulse rate was 120; he had no respiratory rate; he had no lung sounds; the EKG showed a sinus tachycardia; his skin color was cyanotic; his skin temperature was cool; and he had no eye, verbal or motor response. The pupils were reactive and measured 3mm. The patient at this time was, in all probability, brain dead. If resuscitation attempts were

successful, i.e. immediate thoracotomy, removal of hemopericardium, and suture of the Right ventricular laceration, the patient in all probability would not have had a return of spontaneous respirations because of ischemic encephalopathy to the respiratory center in the medulla. To argue that there was delay in his medical care would not be reasonable because the end result would have been, at best, a patient that was brain dead.

The stab wound in the Left axilla of Christopher McLafferty was utilized by hospital personnel in the emergency room as the placement site for a chest tube. This was noted in the history and physical written by Dr. Egan, copy attached.

Should you have any questions, please do not hesitate to call or write. Thank you.

/S/

RICHARD L. PAYNE, M.D.

Enclosures

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DONALD ROBERTS	§	
Appellant,	§	
	§	
v.	§	No. 06-1899
	§	
MIKE KEMNA and,	§	
JEREMIAH NIXON	§	
Appellees.	§	

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 29, 2006

Order entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit